

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
Public Notice on Interpretation of the Terms	)	MB Docket No. 12-83
“Multichannel Video Program Distributor”	)	
and “Channel” as Raised in Pending Program	)	
Access Complaint Proceeding	)	
	)	

**REPLY COMMENTS OF GOOGLE INC.**

Google Inc. (“Google”) files these reply comments in response to the Media Bureau’s (“Bureau”) Public Notice<sup>1</sup> seeking comment on how to interpret the terms “multichannel video programming distributor” (“MVPD”) and “channel” in the context of a pending program access complaint filed with the Bureau by Sky Angel U.S., LLC (“Sky Angel”), a subscription-based provider of video and audio programming over broadband Internet connections, against Discovery Communications LLC (“Discovery”).<sup>2</sup>

The Sky Angel Complaint raises novel questions of law and policy, and the resolution of these novel questions could affect a wide variety of constituents, including video programmers; video service providers, including online video distributors (“OVDs”); consumers; and others. The Bureau should resolve the Complaint in a narrow manner, applying the law in place at the time of the alleged aggrieved conduct to the pertinent facts. It should defer any prospective and

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<sup>1</sup> Media Bureau Seeks Comment on Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” As Raised in Pending Program Access Complaint Proceeding, Public Notice, 27 FCC Red. 3079 (MB 2012) (“Public Notice”).

<sup>2</sup> Sky Angel U.S., LLC v. Discovery Communications LLC, *et al.*, Program Access Complaint, MB Dkt. 12-80, File No. CSR-8605-P (Mar. 24, 2010) (“Sky Angel Complaint”).

far-reaching policy discussions for an open proceeding of general applicability that affords adequate opportunity for robust levels of participation and comment.

In March 2010, Sky Angel filed a program access complaint and an emergency petition for a temporary standstill of its affiliation agreement with Discovery, which Sky Angel claimed that Discovery was threatening to terminate.<sup>3</sup> The Bureau denied the emergency petition in April 2010, finding that Sky Angel failed to carry its burden of demonstrating that its non-facilities-based IPTV subscription service is an MVPD entitled to seek relief under the Commission's rules and was unlikely to prevail on the merits.<sup>4</sup> The Bureau found that Sky Angel had not demonstrated how it offers "multiple channels" of video programming and noted that Sky Angel does not provide its subscribers with a transmission path, which the Bureau stated is a necessary element of a "channel."<sup>5</sup>

In March 2012, the Bureau issued the Public Notice to seek input on issues raised in the Sky Angel Complaint regarding the interpretation of the statutory terms "MVPD" and "channel."<sup>6</sup> The Bureau indicated that it is considering an "alternative interpretation" of the terms<sup>7</sup> and sought comment on the "most appropriate interpretation," as well the "policy ramifications of each interpretation."<sup>8</sup> The Bureau acknowledged that any re-interpretation of

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<sup>3</sup> *Id.* at 4. Sky Angel provides a video service delivered over the top of other service providers' broadband Internet connections. *Id.* at 1-2.

<sup>4</sup> See *Sky Angel U.S., LLC Emergency Petition for Temporary Standstill*, Order, 25 FCC Rcd. 3879 (MB 2010) ("Sky Angel Standstill Order").

<sup>5</sup> *Id.* at ¶ 7.

<sup>6</sup> Public Notice at ¶ 1.

<sup>7</sup> *Id.* at ¶ 11.

<sup>8</sup> *Id.* at ¶ 1.

these terms would have legal and policy implications that extend beyond Sky Angel and Discovery.<sup>9</sup>

The initial comments received on the Public Notice confirm that the potential ramifications of a re-interpretation of these terms are far-reaching, for both businesses and consumers.<sup>10</sup> In particular, re-interpretation of the meaning of MVPD likely would have a significant and disruptive impact on the vibrant and evolving marketplace for video services.<sup>11</sup>

The Bureau should avoid making such wide-ranging determinations in the context of a restricted proceeding that directly involves just two parties.<sup>12</sup> Instead, any Bureau ruling on issues raised in the Sky Angel Complaint should be limited to the particular facts of the dispute, using the law in place at the time of the alleged aggrieved conduct, and should not address possible alternative interpretations of statutory terms and their policy implications. Should the Commission find the need to examine the question of how the terms “MVPD” and “channel” are

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<sup>9</sup> *Id.*

<sup>10</sup> *See, e.g.*, Comments of the American Cable Association at 28-30 (filed May 14, 2012); Comments of AT&T at 2-3 (filed May 14, 2012); Comments of Comcast Corporation at 10-16 (filed May 14, 2012); Comments of Computer & Communications Industry Association at 4-6 (filed May 14, 2012) (“CCIA Comments”); Comments of the National Association of Broadcasters at 1 n.3 (filed May 14, 2012); Comments of the Open Internet Coalition at 2 (filed May 14, 2012) (“Open Internet Coalition Comments”).

<sup>11</sup> Video services and distribution are experiencing a period of tremendous growth, innovation, and competition. *See* CCIA Comments at 4-5; Open Internet Coalition Comments at 4-5. *See also* Comments of Google Inc., MB Dkt. 07-269 (filed June 8, 2011). The combination of rapidly evolving technology, high consumer demand for online video, and low barriers to entry has created an environment where many innovative entrants, large and small, have been able to thrive, bringing new viewing options to consumers as well as new avenues for distribution to content producers. As the CCIA and the Open Internet Coalition have noted, subjecting new competitive entrants to regulations adopted expressly for facilities-based MVPDs could adversely affect OVDs and other entities that generally are not subject to such regulation today. *See* CCIA Comments at 4-5; Open Internet Coalition Comments at 3-4.

<sup>12</sup> Policy considerations aside, the Bureau’s delegated authority is limited with respect to “matters that present novel questions of law, fact or policy that cannot be resolved under existing precedent and guidelines.” 47 C.F.R. § 0.283.

to be interpreted prospectively, a permit-but-disclose proceeding allowing for full consideration of the issues and a more robust public debate on the potential implications of future policy changes would be a more appropriate vehicle.<sup>13</sup>

Respectfully submitted,



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<sup>13</sup> A restricted proceeding limits the ability of affected parties to make presentations on the merits to Commission staff. *See id.* § 1.1206.